April 1, 2016

VIA FEDERAL eRULEMAKING PORTAL: http://www.regulations.gov

Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Re: Comment on the Equal Employment Opportunity Commission's Proposed Revision of the Employer Information Report (EEO-1); ID: EEOC-2016-0002-0001, 81 Fed. Reg. 5113 (Feb. 1, 2016)

Dear Ms. Wilson:

The Society for Human Resource Management ("SHRM") appreciates the opportunity to provide comments on the Equal Employment Opportunity Commission's proposal to seek a three year approval under the Paperwork Reduction Act ("PRA") of a revised Employer Information Report (EEO-1) data collection, which would require private employers with 100 or more employees to report employee pay and hours worked data, in addition to the currently required gender, race, and ethnicity information. These comments were prepared on behalf of SHRM with assistance from Berkshire Associates Inc.[1]

Because the EEOC's proposed new data collection is proposed under the PRA, SHRM's comments focus on whether the EEOC's proposal meets the PRA standards. Under the PRA, any data collection must (1) minimize the burden on those individuals and entities most adversely affected and (2) maximize the practical utility of and public benefit from information collected

[1] Berkshire Associates Inc. ("Berkshire") is a human resources consulting and technology firm specializing in affirmative action compliance and applicant management. A certified small business enterprise, Berkshire prepares more than 6000 affirmative action plans every year and regularly assists federal contractors and subcontractors during compliance audits by the Department of Labor's Office of Federal Contract Compliance Programs and in conducting salary equity analyses. Berkshire also assists its clients with other reporting requirements, including the filing of EEO-1 Reports, having filed over 17,500 such reports on behalf of clients in 2015. Berkshire's clients vary in size from small establishments who file one EE0-1 Report to nationwide employers who file hundreds of EEO-1 Reports capturing data on thousands of employees. Berkshire regularly provides affirmative action consulting services to clients in a wide range of private industry from manufacturing to professional service organizations.

by or for the federal government while meeting certain confidentiality standards. *Dole v. United Steelworkers of America,* 494 U.S. 26, 32 (1990). It is through this lens that SHRM provides the following comments on the EEOC's proposed revisions to the EEO-1 Report.

STATEMENT OF INTEREST

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India, and the United Arab Emirates. About 73 percent of SHRM members are women, approximately 78 percent work at a company employing 5,000 employees or less, and a significant number of SHRM members work for a federal contractor or subcontractor.

SHRM has a long history of working cooperatively with the EEOC on equal employment opportunity issues, including on the agency's prior revisions to the EEO-1 Report to alter the race and ethnicity categories used in the data collection. SHRM strongly supports nondiscrimination in compensation policies and practices and believes that compensation decisions should be based on an individual's qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. To assist HR professionals, SHRM provides a variety of educational resources for its members on issues related to compensation and nondiscrimination including seminars, articles, toolkits, webinars, and conference programming. Compensation and nondiscrimination are topics addressed at nearly all SHRM conferences, including the role of compensation as a talent management strategy.

SHRM members regularly help their organizations evaluate pay equity issues. Companies routinely examine organizational pay practices at natural points in the employee life cycle, such as at time of hire, during the performance review process, and when an employee is promoted. Employers also evaluate pay at natural points in the job cycle, such as when job descriptions are updated, or on a periodic basis by department. For large companies, this means many are looking at employee compensation issues daily. As part of pay evaluations, internal and external equity issues are usually examined. Many employers, including all federal contractors, also evaluate their compensation systems on an annual basis to ensure pay decisions are free from discrimination on the basis of race and sex.

THE ROLE OF COMPENSATION IN AN ORGANIZATION'S TALENT MANAGEMENT STRATEGY

One of the key focuses for SHRM members, and indeed all Human Resource professionals, is managing talent in order to create a successful work environment. One aspect of talent management includes creating an effective total rewards strategy to recruit and retain employees that is made up of compensation, benefits, personal growth opportunities, and increasingly, workplace flexibility options. In developing a total rewards strategy, HR seeks to provide the employer and employees with an approach for compensating employees that is

compatible with the organization's mission, strategy, and culture, appropriate for the specific workforce, and also internally and externally equitable.

The degree of market competition, the level of product demand, and industry characteristics all have an influence on compensation and benefits philosophy. In order to effectively recruit new employees and retain existing ones, an organization must have internal equity, where performance or job differences result in corresponding differences in rewards that are fair. Organizations also must ensure external equity where an organization's compensation levels and benefits are competitive with organizations in the same labor market that compete for the same employees. An organization is likely to use a combination of strategies in approaching pay. For example, for critical jobs and competencies, the organization may decide to lead the competition in compensation whereas in other areas, the organization may match what its competitors are paying employees.

Once an organization has defined its compensation philosophy, Human Resource professionals typically create a pay system which consists of grouping jobs into pay grades and creating a pay range to set the upper and lower limits of compensation for employees in each grade. The midpoint is often considered the market rate paid to an experienced employee meeting performance expectations. A well-designed pay system not only helps attract employees but also plays an important role in motivating and retaining employees. Differentiators include productivity-based pay determined by the employee's output, such as a piece rate system, as well as person-based pay which ties pay to desired employee characteristics such as knowledge, which includes certifications and other education credentials; skills; and competencies that an individual employee may possess, such as experience directing or training others.

Of course, a variety of pay adjustments also affect take-home pay: cost-of-living adjustments; general pay increases based on competitive markets; seniority increases; and differential pay based on the type of work. Differential pay includes additional pay for less desirable shifts; emergency shifts; premium pay for working holidays or extra hours; hazard pay; on-call pay; reporting pay; travel pay; and overtime pay. Geographic differential pay includes accommodating cost-of–living in different locations; attracting workers to certain locations; or foreign pay. Incentive pay for meeting organizational goals in productivity or sales is also common.

Pay structures also must be reevaluated over time to ensure the ranges remain both internally equitable and externally competitive. In fact, an essential part of maintaining equity and fairness in the workplace is regular evaluation of the organization's total reward strategy—including pay, benefits, performance appraisals, professional development, and other career opportunities. It is also important that organizations share their compensation philosophy throughout the organization and are transparent with regard to how pay decisions are made.

As you can see, employers design their pay structures to reflect the unique characteristics of their jobs and organizations, and to interest qualified applicants and retain qualified employees who are attracted to the mix of work and rewards offered by that employer. Pay decisions in every organization are complex, and based on a variety of factors that are unique to the particular organization's compensation philosophy. Given this complexity, it is hard for SHRM members to envision <u>any</u> <u>uniform</u> pay data collection tool that could provide meaningful information about

the reasons for a particular employee's pay, without the form being so incredibly complex that it would be impossibly burdensome to implement.

Unlike the race, ethnicity and gender data currently collected on the EEO-1 Report, pay is not an immutable characteristic nor is it a static one. Analyzing a snapshot of employee pay at a point in time does not tell the EEOC anything about the multiple pay decisions that form the basis for the employee's current pay, which must be the focus of any discrimination claim. As discussed in further detail below, gathering the best available data to understand pay decisions would require the collection of information far beyond the data points currently proposed. However, as the EEOC itself rightly recognized in its proposal, collecting the "most comprehensive" information, including the unique factors that drive compensation at a particular organization is far too burdensome an approach for an annual reporting requirement.

Given the complex reality of how pay decisions are made, the proposed data collection requirement lacks any practical utility under the PRA and does not meet the EEOC's stated objective of "improve[ing] enforcement of federal laws prohibiting pay discrimination." This lack of utility, combined with concerns about the burden on employers, and security and confidentiality of the data, SHRM respectfully asks the EEOC to withdraw the proposed data collection.

COMMENTS ON THE EEOC'S PROPOSED REVISIONS TO THE EEO-1 REPORT

I. THE EEOC'S PROPOSED DATA COLLECTION.

The EEOC's proposal seeks to require private employers with 100 or more employees (including federal contractors) to submit annual employee compensation data to the EEOC in order to "support its wage discrimination law enforcement efforts." 81 Federal Register 5113, 5114 (February 1, 2016). Under the agency's proposal, which was coordinated with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), all covered employers would continue to file the data required by the current EEO-1 Report – gender, race, and ethnicity information for each employee in ten EEO job categories (referred to as "Component 1" in the EEOC's proposal). In addition, beginning in 2017, covered filers with 100 or more employees would also file a "Component 2" with the following additional data points:

- W-2 wage information for all workers in the job category by race, ethnicity, and sex within 12 proposed pay bands; and
- Total hours worked, defined as the number of hours worked by all employees in the job category by race, ethnicity, and sex within each of the 12 proposed pay bands.

The proposed data collection would be filed for the headquarters and each establishment of a covered filer by September 30 of each year. The reported W-2 wage and total hours worked data would not be a snapshot, as are the current reporting requirements for race, ethnicity, and gender. Instead, employers would report each employee's total hours worked and W-2 wage information for the 12-month period preceding the selected payroll snapshot date, which can be

any payroll period occurring in the months of July through September of the filing year. The agency's stated goals for the data collection are to (1) "assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities;" (2) develop unspecified "software tools and guidance for stakeholders to support analysis of published aggregated EEO-1 data;" and (3) "encourage employers to self-monitor and comply voluntarily if they uncover pay inequities."

II. A ONE SIZE FITS ALL ANNUAL COMPENSATION DATA COLLECTION TOOL HAS NO UTILITY FOR ENFORCEMENT.

SHRM and its members support the agency's commitment to rooting out all forms of employment discrimination, including compensation discrimination. SHRM also appreciates the agency's desire to address the raw wage gap between men and women. SHRM acknowledges that there have been numerous studies analyzing the pay gap, yet disagreements exists as to the size and scope of the gap. Furthermore, a complete explanation of the reasons for the pay gap has remained elusive. For these reasons, SHRM supports the Commission's desire to better understand the reasons for the pay gap, but given the complexity of pay decisions, we question whether a uniform data collection tool of any kind is the best way to address this issue, particularly since the PRA requires that any data collection must (1) minimize the burden on those individuals and entities most adversely affected and (2) maximize the practical utility of and public benefit from information collected by or for the federal government while meeting certain confidentiality standards. *Dole v. United Steelworkers of America,* 494 U.S. 26, 32 (1990).

Some of the most recent work in the area of determining the factors that influence pay differences between men and women, points to more nuanced factors that could never be captured in a data collection instrument. Claudia Goldin, in her research, describes the cost of "temporal flexibility" and Anne-Marie Slaughter similarly refers to the "motherhood" or "care" penalty that leads many women to pursue jobs that prioritize flexibility over salary. Dubner, Stephen J. "The True Story of the Gender Pay Gap." Audio blog post. *Freakonomics*. Freakonomics Radio, 7 Jan. 2016. Web. 22 Mar. 2016. <http://freakonomics.com/?s=pay+gap>.

Because of this, SHRM agrees with the Department of Labor's earlier conclusion that "the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action." U.S. Department of Labor, "An Analysis of Reasons for the Disparity in Wages Between Men and Women" (2009). Our experience also leads us to question whether any annual compensation data collection tool could ever impact the dynamics of cultural change that may be necessary to effectively address the pay gap. Just as the raw wage gap should not be used as a basis for enforcement, raw differences in W-2 wages for employees in the same EEO-1 job category should also not be used to identify employers for compliance reviews by the OFCCP or focus the EEOC's own investigations, including Commissioner charges.

One powerful way to decrease the pay gap, it is argued, is to increase the demand for and value of workplace flexibility. SHRM, with our partner, the Families and Work Institute (FWI), has championed the creation of flexible workplaces and the use of flex options, without jeopardy, for ALL employees—men and women alike—by providing training materials and educational

programming to help enhance flexibility in all types of workplaces. Together, we also recognize employers for exemplary work-flex practices through our When Work Works Award. These efforts are achieving significant results in this area.

Our experience with workplace flexibility underscores the reality that an employee's own chosen career path is an important driver of an employee's job satisfaction and current salary -- previous jobs, departments, experience, education, and geographic locations all affect pay decisions. Similarly, levels of responsibility, such as the number and type of direct reports, oversight responsibilities for budgets or customer accounts, and performance history affect individual compensation. From the HR perspective, these differences in knowledge, skill, ability, proficiency, responsibility, and geographic location, provide a legitimate basis for differences in pay among employees doing similar work.

The key, however, is figuring out where illegal discrimination may be occurring, if at all. Unfortunately, the data the EEOC wants to collect from employers does not help root out those employers with illegal and discriminatory practices, even at a preliminary level. This is because the agency will only be collecting data about the raw wage differences between employees of different genders and races, and will not, and indeed realistically cannot, collect data about the constellation of factors – including an employee's own choices that impact pay. The proposed data collection also will not shed more light on whether broad patterns of occupational segregation exists – those trends, to the extent they exist, are already fully visible within the demographic data currently collected.

The OFCCP's failed experiment with the EO Survey, which also gathered aggregated compensation data by EEO-1 job category, is further evidence of the limited utility of using a uniform data collection tool to evaluate whether it is likely that a particular employer has engaged in potential compensation discrimination. Indeed, the OFCCP itself appears to recognize the limited utility of summary compensation data, having recently revised its scheduling documents to require that federal contractors provide individual, employee-level data at the beginning of every compliance review. Private employers do not use a single, lockstep compensation system like the federal government and, as a result, pay decisions are based on a variety of factors which cannot easily or efficiently be captured in a uniform reporting format.[2] However, while gathering employee-level data may be necessary for a compliance review, it does not make sense to ask employers across-the-board to submit this level of data.

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[2] The enforcement history of the EEOC and OFCCP further undermines the need for summary level data about pay. Each year the EEOC receives about 1000 charges of discrimination involving equal pay discrimination. In Fiscal Year 2015, close to 64% of those were found to be without merit and another 16% were closed for administrative reasons with no finding of discrimination. Some might argue these results minimize the problem because more charges are not filed due to lack of employee knowledge of pay discrimination. However, OFCCP's results are similar, even though the agency audits federal contractors' compensation practices through a neutral selection process not requiring an employee complaint. Between January 1, 2010 and September 30, 2015, despite a clear emphasis on compensation discrimination issues and access to far more detailed individual employee-level compensation data, less than a handful of the OFCCP's compliance evaluations have resulted in a finding of compensation discrimination. Furthermore, any findings of compensation discrimination generally have been limited in scope, often concerning pay differences between small groups of employees in the same job title, rather than widespread across an employer's workforce.

While additional pay data may be interesting to the many academic researchers with whom the EEOC apparently shares its data EEO-1 data, the agency should not proceed for this reason alone. Indeed, as discussed further herein, providing researchers with access to establishment-level information about compensation raises serious concerns about the EEOC's ability to appropriately safeguard this data and maintain its confidentiality as required under Title VII and the PRA.

Simply put, the government's own studies conclude that many factors other than discrimination contribute to the raw wage gap between women and men. Further, the government's own enforcement experiences, during EEOC investigations, OFCCP compliance reviews, and with the EO Survey, demonstrate that a review of aggregated compensation data does not accurately identify those employers more likely to engage in pay discrimination, and even worse, could hide those that may be discriminating. Given this, the proposed compensation data collection requirements appear to be aimed at equating "fair pay" with a uniform approach to compensation that discredits and discourages any pay differential regardless of whether the employer's compensation practices are the result of unlawful discrimination. SHRM respectfully submits that this approach goes beyond the government's legal mandate to eliminate unlawful compensation discrimination, and, more importantly, does not satisfy the standards of the PRA under which this data collection is being proposed.

III. THE IMPORTANCE OF FURTHER STUDY TO DEVELOP A DEFINITIVE PLAN FOR FILING AND ANALYZING THE NEW DATA POINTS.

Before it begins asking employers to collect and report this data, the agency should undertake further study of how it will safely collect and appropriately use the proposed wage information. As the EEOC readily acknowledges in its proposal, the National Academy of Sciences (NAS) "emphasized the importance of a definitive plan for how the data would be used in coordination with other equal employment opportunity enforcement agencies." 81 Federal Register at 5114 (*citing* National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers*. Washington D.C.: National Academies Press (2013), available at http://www.nap.edu/openbook.php?record_id=13496 (website last visited March 15, 2016) (emphasis added). The EEOC's proposal is relatively silent, however, on both fronts—simply assuring employers that the collected data will be maintained confidentially and that the agency "plans to develop" statistical and software tools for agency staff and stakeholders. Quite simply, these vague promises do not equate to the "definitive plan" envisioned by the NAS, nor do they satisfy the standards under the PRA. Importantly, SHRM believes that the EEOC has significantly underestimated changes that might be required to the current report filing system before the agency itself can securely and efficiently collect the proposed data from employers. The agency's pilot study of two synthetic data sets also falls short of establishing a definitive plan.

It is not enough that the EEOC and OFCCP "coordinated" on their data proposals. While the employer community appreciates that there will not be two different compensation data collection tools, mere coordination does not mean that one compensation data collection tool

used by both agencies is any better. It is troubling that the agencies do not appear to have coordinated in a way that would more meaningfully assess the utility of the proposed data collection tool. Rather than use actual employer compensation data from OFCCP compliance reviews, EEOC chose to use synthetic data sets to evaluate its proposed tool. EEOC also ignored its sister agency's own studies on the reliability of a very similar tool – the OFCCP's failed EO Survey – which also collected compensation data by EEO-1 job category.

To understand the significant issues that require consideration by the EEOC, it is important to understand how the current EEO-1 Report filing process works. SHRM received 262 responses to our informal survey on filing EEO-1 reports. About 70 percent of SHRM members who responded indicated that their companies currently file EEO-1 Reports by manually entering the required information into the EEOC's electronic system (The EEOC refers to this as electronic filing in its proposal, even though manual entry or keying is required).[3] Employers that file a large number of EEO-1 reports tend to use the batch upload feature, which currently requires that the company email the file to the EEOC for uploading. The EEOC does not provide employers using the batch upload feature a secure transmission portal for this purpose. Once the EEOC uploads the batch file, which sometimes takes one month or more, the employer has to review any reports marked as "I" or incomplete and address any warning notices before it can certify the reports.

SHRM believes that many more employers may wish to use the batch upload feature if the proposed revisions are finalized, because of the sheer increase in the number of data cells that would need to be manually entered into the EEOC's electronic system using the other electronic filing method. Yet the EEOC's proposal makes no mention of whether the agency plans to create a more secure transmission method for sending these batch files to the agency. Indeed, it does not appear that the EEOC intends to create a secure transmission site since the estimated costs to the government of the EEOC's current proposal only include increases to the EEOC's internal staffing costs. As OFCCP likely knows from its efforts to establish a secure file transmission site for federal contractor data submissions, the cost of creating a secure site can be significant and should, therefore, be included in the agency's cost estimates. *See, e.g.,* OFCCP's FY 2017 Congressional Budget Justification, available at http://www.dol.gov/sites/default/files/documents/general/budget/CBJ-2017-V2-10.pdf (noting OFCCP's FY16 plans to establish a secure file transfer protocol site to allow federal contractors to securely submit AAP data, including compensation information, to the agency.)[4]

[3] As discussed below, the EEOC's mistaken belief that the availability of electronic submission allows the agency to calculate burden based on number of filers, rather than number of keystrokes by filer, significantly underestimates the burden of filing the current EEO-1 Report as well as the proposed data collection.

[4] SHRM respectfully disagrees with the comments at the public hearing suggesting that it is the employer's responsibility to encrypt its data so that it can safely comply with a directive to send information to the federal government. If this is the position taken, then the EEOC must then include the cost of employer creation of a secure file transfer site for this purpose in its burden estimates, since many employers, particularly small businesses, do not currently have a secure file transmission site.

SHRM encourages the EEOC to consult with the Internal Revenue Service ("IRS"), which also collects W-2 wage information from the public, to better evaluate why the EEOC's current practice of requiring email submission of batch upload files creates a security risk. The IRS' website specifically notes that electronically filed submissions that are uploaded rather than entered directly in the IRS' online system are "securely transmitted through an IRS-approved electronic channel." The agency notes that this information is "not sent by e-mail because e-mail is not as safe as our secure channels." Internal Revenue Service website, available at https://www.irs.gov/uac/efile-with-Commercial-Software (last visited March 17, 2016).

The agency's further study of this issue should not only examine whether covered filers will be able to securely submit the requested data, but also should examine the burden of doing so and the utility of the data in meeting the agency's stated objectives for collecting it. SHRM does not believe that the EEOC's analysis of two sets of synthetic compensation information constitutes an adequate or reliable study regarding the cost or utility of the proposed data collection requirements. This approach is particularly unwarranted since the EEOC, through its information sharing arrangements with OFCCP, has access to establishment-level compensation data sets for actual employers. Reviewing these data sets, particularly after a full compliance review by OFCCP, would have allowed the agencies to more accurately assess whether the proposed data collection tool has any practical utility in focusing investigations or identifying potential pay discriminators. Alternatively, as the agency recognizes, it could have sought PRA approval to conduct a more robust study of a larger sampling of employers. While perhaps not consistent with the agency's current desired timeline, such an approach would have allowed the agency to more adequately assess the potential burdens and benefits of its proposal, as required by the PRA.

Quite simply, it is unsettling to our members, particularly those federal contractors who filed the failed EO Survey with the Department of Labor, to find that the government is yet again imposing a burdensome, large scale data collection without adequate preparation about how it will use the data it receives, or whether the data collected will be useful for its stated purposes. This "collect first" and "prepare second" approach reinforces SHRM's view, that the data collected ultimately will not have any practice utility.

IV. THE EEOC'S PROPOSAL DOES NOT SATISFY THE CONFIDENTIALITY MANDATES OF TITLE VII OR THE PRA

Our members have expressed substantial concerns about the confidentiality of the compensation data the EEOC proposes to collect. The EEOC's proposal, even after exempting employers with less than 100 total employees and accounting for the fact that the collected pay data is reported by pay band, would still gather very specific compensation information by specific establishments, including very small establishments. For many small employers, and even larger employers with small establishments or few employees in certain EEO-1 job categories, reporting data in this manner will result in the reporting of individual, employee-level data, albeit by pay band. The EEOC's proposal also indicates that the EEOC will publish the compensation data of employers in an aggregated format, and testimony provided at the public

hearing revealed that the agency regularly makes establishment-level EEO-1 data available to some unspecified group of academic researchers.

Compensation data of the nature the EEOC intends to collect is especially sensitive and confidential – to both employees and employers. Release of an individual's compensation information – through the Freedom of Information Act ("FOIA"), by intentional misappropriation, or through a database of aggregate compensation information – poses serious concerns to the members SHRM represents. Likewise, it is not hard to imagine that many employees would not want to have their compensation information made publicly available because of a cyber security breach of the EEO-1 Report filing system. For this reason, SHRM urges the EEOC not to move forward with the implementation of any compensation data collection tool until appropriate data security safeguards are developed, tested, and perfected to ensure protection of employees' pay data.[5]

SHRM also has serious concerns about the agency's apparent practice of providing establishment-level data to academic researchers, as revealed at the EEOC's public hearing on this issue. As one academic researcher at the EEOC's public hearing noted, the data provided to her by the EEOC is some of the only available "workplace level" data on workforce equity issues. Because of the sensitivity of pay data, and the likelihood that establishment-level data for even larger employers may reveal the specific pay band of an individual employee, SHRM is concerned that the EEOC's practices in this regard may not be compliant with Title VII, the Intergovernmental Personnel Act appointment system under which some of these researchers have gained access to the data, or the PRA requirement that any data collected be maintained in accordance with all applicable confidentiality, privacy and security requirements.

The EEOC's authority to require the EEO-1 report is derived from Section 2000e-8 of Title VII of the Civil Rights Act of 1964, as amended, which provides that "[e]very employer, employment agency, and labor organization . . . shall make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder." The same provision makes it unlawful for any EEOC employee to "make public in any manner whatever any information obtained . . . prior to the institution of any proceeding . . . involving such information." The agency's regulation implementing this requirement provides that the obligation to hold such information confidential does not apply in certain instances, including the "publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information." 29 CFR § 1601.22 (emphasis added).

SHRM questions whether providing detailed EEO-1 Report information to a select group of academic researches falls within the "publication" exemption or any of the other enumerated confidentiality exceptions to the duty to maintain this information confidentially. Even the practice of providing academic researchers access to such data under an Intergovernmental

[5] In doing so, the agency should consider that many employers have firewalls that prohibit or severely restrict the transmission of data over the Internet, including the size of files that may be transmitted. Similarly, any electronic submission system should be designed to permit secure encryption of data and password protection for all data uploads.

Personnel Act appointment raises concerns under the PRA. At a minimum, the EEOC should publish the list of academic researchers with whom it shares EEO-1 Report information, the type of access granted to each, the security measures used to transfer the data to the researchers, and any confidentiality agreements these researchers may sign, so that employers and the Office of Management and Budget may appropriately evaluate whether the EEOC has satisfied the PRA's purpose of ensuring that the proposed data collection is collected and maintained in a manner consistent with applicable confidentiality, privacy, and security laws. *See*, *e.g., In re French*, 401 B.R. 295 (E.D. Tenn. 2009).

To further minimize confidentiality concerns, SHRM also suggests that the agency exempt small establishments of larger employers from having to file Component 2 data. At a minimum, employers with establishments of less than 50 employees (those that are filed as Type 6 or 8 reports) should not have to provide Component 2 data on the establishment report (although such data could be reported in the employer's consolidated report). More broadly, SHRM encourages the EEOC to consider eliminating the requirement to provide establishment level Component 2 data for any establishment of 100 or less employees. Taking any of these approaches better addresses the confidentiality concerns of employees and employers, more appropriately minimizes the burden on filers by reducing the number of cells to be completed by larger employers, and is more consistent with the EEOC's proposal to exempt employers with less than 100 employees from the requirement altogether. The EEOC also should carefully consider the comments of the National Research Council of the National Academies regarding statistical protection of tabular data and microdata before publishing any aggregated, industry compensation of federal contractors. *See* National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), available at http://www.nap.edu/openbook.php?record_id=13496 (website last visited January 5, 2015).

V. COMMENTS ON THE FORMAT, UTILITY AND BURDEN OF THE PROPOSED DATA COLLECTION

While SHRM believes that the proposed data collection tool does not satisfy any of the three prongs of the PRA, we understand that the agency may still go forward with its proposal. Accordingly, we want to offer some suggestions for the agency to consider that might better balance the burden on employer with the limited utility of a one size fits all data collection tool.

SHRM strongly supports the agency's decision to exempt small employers of less than 100 employees from the proposed Component 2 reporting requirement. Nearly 25% of SHRM members have fewer than 100 employees and these small employers are far less likely to have existing payroll and personnel systems from which they could easily retrieve the type of data requested. In addition, data cells by EEO-1 job category are likely to be small for these employers, increasing concerns that an individual employee's pay information will be revealed. For these reasons, and because any analysis of such small groupings of employees is unlikely to reveal meaningful disparities in compensation, we strongly support the EEOC's proposal to exempt businesses with 100 or fewer employees from the proposed Component 2 filing requirement. We urge the EEOC to extend this exemption to the small establishments of larger

employers for the same reasons the EEOC has decided to exempt employers with fewer than 100 employees total.

While exempting small employers and establishments from the reporting requirement is important, for the reasons discussed below, SHRM does not believe that the proposal will meet any of the EEOC's stated objectives for collecting this data from employers, thereby failing the PRA's requirement that any proposed data collection have practical utility. Moreover, the collection of this data in the format proposed is far more burdensome than the agency estimated. Given the limited utility of the aggregated data to be collected in furthering the agency's enforcement purposes or employer's compliance efforts, the burden of this new collection requirement cannot be justified.

A. Collecting Aggregated W-2 Wage Information By Pay Band

SHRM appreciates the EEOC's desire to collect compensation data that may be readily available to employers. However, the agency's proposed collection of W-2 wage information is misplaced for several reasons. First, the proposal will not allow the government to compare comparable compensation data points. Second, the proposal does not appropriately minimize the burden on employers, when other more readily available data points would allow the EEOC an adequate window into most potential pay discrimination issues.

W-2 wages is defined broadly by the IRS and includes payments by an employer to an employee for parking and mass transit stipends, military stipends, relocation and travel stipends, expense reimbursements, 401(k) contributions, severance payments, deferred compensation, and profit sharing, in addition to any wages. 2016 General Instructions for Forms W-2 and W-3, available online at https://www.irs.gov/pub/irs-pdf/iw2w3.pdf (website last visited March 17, 2016). Although the EEOC's proposal is not clear, we assume that the agency intends to require employers to report each employee's W-2 wages reported on Box 1 of the W-2 Wage and Tax Statement since an employee's gross wages are not listed on the IRS' official W-2 Wage and Tax Statement. This is also consistent with OFCCP's earlier proposal, which specifically noted that employers would report the wages reported in Box 1 of the W-2 Wage and Tax Statement.

However, the W-2 wage information reported in Box 1 includes payments to employees that are driven primarily by employee choice and other factors that have no bearing on the employer's decision as to how much an employee earns. Because of this, collecting W-2 wage data will not allow the EEOC or OFCCP to evaluate comparable compensation data points – a key issue if the agency wants to use the data to identify pay disparities that may be based on race or sex.

For example, two Professional employees, one male and one female, may earn the exact same base pay, bonus and other compensation, but if the female contributes fully to her 401(k) account and the male employee does not, it will appear that the male employee is earning almost $18,000 more. Providing hours worked for these two employees will shed no light on the legitimate, nondiscriminatory reason for the raw difference in pay. Likewise, while shift differential pay would be included in the W-2 wage amount, the proposed data collection does not include a way for employers to indicate which shift each employee worked, even though employee shift selection may be an important reason for any raw pay differences between men and women. Likewise, two production workers could have different W-2 earnings if one was

excused from working overtime hours as a reasonable accommodation under the Americans with Disabilities Act ("ADA"), while another not only worked continuously throughout the year but also worked all overtime hours available to her. Providing hours worked by both employees does not adequately account for the differences in pay because there is no way to account for the fact that some of the hours of one employee were paid at a premium rate, while the other employee asked to be excused from all overtime hours for a legitimate, nondiscriminatory reason.

Providing W-2 wage information is also problematic because the EEO-1 report is intended to be a "snapshot" of an employer's workforce. Unlike employee race and gender information, which generally does not change, pay is anything but static, changing from year to year and even throughout the year, including for reasons of promotion, career change, merit increases, excused leave under the ADA or other leave laws, and other reasons of employee choice. For example, two employees may have the same stock options available to them, but may choose to cash them out in two different reporting years. Using W-2 wages would make it appear that one employee received significantly more compensation than the other, even though both had the same benefits. Reporting hours worked information for these two employees would not shed any light on the reason for the pay disparity. Likewise, two employees may report different W-2 wage information in a calendar year if one of the employees received a $25,000 signing bonus that year, and the other did not. This is the case even if the other employee received the same $25,000 signing bonus when he or she began employment in a different calendar year. If the two employees are of different races or genders, aggregating the W-2 wage information of these two employees will make it appear as if there is a potential pay discrimination issue. Again, reporting total hours worked for these two employees would not account for the legitimate, nondiscriminatory reason for the difference in pay. In yet another example, job changes throughout the reporting year, such as the mid-year promotion of a woman into a higher level position, may make it appear as if she is earning less than others, when in fact she could be being paid the same salary.

Given these limitations of collecting W-2 wage information, SHRM believes that if the EEOC goes forward with the compensation reporting obligation, annualized base salary or wage rate is a more meaningful data point to collect for conducting a preliminary analysis of employers' compensation practices. This approach significantly minimizes the burden on filers because annualized base salary information is regularly maintained in most employers' HRIS systems, where race, ethnicity, gender and EEO-1 information is already stored. Thus, using annualized base salary or wage rate information has the following benefits:

(1) Eliminates employer time required to gather W-2 wage information spanning two calendar years from a separate payroll system;

(2) Eliminates employer time required to integrate its payroll and timekeeping system or systems with its HRIS system, which is where race, ethnicity and gender data is most commonly stored;

(3) Removes the tension between the current "snapshot" approach of the EEO-1 Report and the agency's current proposal; and

(4) Eliminates the need to collect hours worked information altogether, which further minimizes the burden of any collection requirement on filers because, as discussed

below, it eliminates the need for filers to complete more than 1800 cells per establishment.

SHRM recognizes that a compensation data collection tool that uses this information would likely still result in a high number of false positives and false negatives. However, SHRM believes that a data collection tool limited to this wage information more appropriately minimizes the burden on the regulated community of providing compensation data to the federal government using a generic compensation data tool.[6]

If the EEOC decides to continue to require W-2 wage information, then the EEOC should change the reporting period for the EEO-1 Report to a calendar year reporting system to better harmonize the requirements with reporting of W-2 wage information already provided to other federal agencies. Under this approach, all employers would use the same snapshot date – December 31 of each year. This would be significantly less burdensome than the current proposal because employers would not need to aggregate W-2 wage and hours worked information over two calendar years before reporting it to the EEOC. This approach also is consistent with the manner in which most payroll systems store gross wage information, which is generally used to prepare W-2s.

B. Collecting Total Hours Worked Information

The EEOC's proposal also requires that employers report total hours worked by race/ethnicity and gender in each EEO-1 job category using the 12 pay bands. The agency proposed that actual hours of work be provided for non-exempt employees, and requested comments on the type of hours information that should be reported for exempt employees, such as to assume all full-time, exempt employees work 40 hours per week. Reported hours also may be adjusted for workers who only worked a portion of the calendar year by using date of hire or dates of absence.

The vast majority of our members do not currently collect actual hours worked data for exempt employees. Indeed, at the most fundamental level, one of the hallmarks of being classified as an exempt employee is that one's compensation is <u>not</u> based on hours worked. Instead, exempt employees are compensated based on outcomes and projects completed.

Under the proposal, it appears that employers who did not collect actual hours worked data may be expected to use a default hours estimate of 40 hours per week for all exempt employees. However, not all employers adopt a 40-hour workweek; the "standard" workweek for some employers may be 35 or 37.5 hours. In addition, in some local jurisdictions, the maximum workweek for some professions is established by law at a number below 40 hours per workweek. These differences in the standard workweek across employers would not be captured in the

[6] As discussed below, requiring that employers provide compensation data other than annualized base salary or wage rate would require extensive research and data entry for most employers. The majority of employers do not maintain W-2 wage information, EEO-1 job category, and race, gender, and ethnicity information in a single, centralized system or database. In light of this, many of our small to mid-size members believe that such data would have to be compiled manually on an annual basis. For larger employers, where manual tabulation is simply not possible, responding to a compensation data collection tool that requires reporting of W-2 wage information by EEO-1 job category will require a capital investment in new systems or programs. The EEOC significantly underestimated the burden associated with these tasks in its proposal.

proposal, even though such differences might have a direct impact on how one employer's summary pay data compares to another employer's summary pay data.

Regardless of whether an employer's "standard" workweek is 40, 37.5, or 35 hours, many exempt employees regularly work hours that vary from their employer's standard workweek, such that using a single, default hours worked figure for all exempt employees will lead to anomalous results, when looking at pay data in the broad EEO-1 job categories. For example, assuming that all exempt employees categorized as professionals work 2,080 hours does not accurately reflect that one professional, such as a doctor or lawyer, may be more highly compensated precisely because she is expected to be available to handle work matters that arise after normal business hours, thus requiring that she work more than 2,080 hours. Yet, the salary of this employee would be averaged with the salary of a lower earning male professional accountant who is paid less in part because he generally does not work outside normal business hours, without any way of accounting for the increased number of hours worked by the exempt female employee.

Reporting total actual hours worked without additional information also fails to account for the personal choices some employees make. For example, if two non-exempt employees are both offered the same amount of voluntary overtime, but only one agrees to work the additional hours, how will the agency view this data, if reported in an employer's annual Component 2 filing? Under the agency's proposal, the pay and hours worked for one employee will be higher than the other, but there will be no way for an employer to indicate that the difference in pay was due to employee choice, rather than any decision by the employer. While the EEOC's proposal suggests that collecting this type of data will allow the government to evaluate whether there are barriers to equal opportunity for earning other types of compensation beyond base salary, this example aptly illustrates why drawing any conclusions from this type of data would be flawed.

Our members also take seriously the requirement that EEOC expects each employer to file "complete and accurate" EEO-1 Reports. And well they should since the penalty for making willfully false statements on an EEO-1 Report includes a fine and possible imprisonment. *See* 29 CFR §1602.8. Understandably, our members have serious concerns about a proposal that requires them to report what they know to be inaccurate information on hours worked for large portions of their workforce. Yet, collecting "complete and accurate" actual hours worked information for all exempt employees is untenable and wholly unaccounted for in the EEOC's burden estimate.

Given the above limitations associated with collecting actual total hours worked for exempt employees, SHRM respectfully suggests that the EEOC abandon its proposal to require annual reporting of this information to the government. Even without further study, it is clear that any data reported would not be a reliable approximation of the number of actual hours worked by exempt employees. Given this reality, it is simply not fair for the agency to ask employers to certify that their EEO-1 Reports are "complete and accurate." For the same reason, the unreliability of the information that might be reported also makes the collection of such data utterly meaningless for the EEOC's stated purposes.

C. Collecting Aggregated Compensation Data By EEO-1 Job Category

One of the most significant weaknesses of the OFCCP's failed EO Survey was that it aggregated data by EEO-1 job category. As discussed above, aggregated compensation data of any kind is simply not useful to the EEOC's stated purposes. Indeed, the OFCCP's own validation studies of the EO Survey conclusively demonstrated that particular data collection tool was not a valid predictor of discrimination or compliance with the agency's regulatory requirements. 71 Federal Register 53037 (September 8, 2006). The OFCCP's current compliance review submission requirements, which were also approved under the PRA and require that federal contractors submit disaggregated, individual employee-level data, underscore the limitations of aggregated compensation data. Despite the lessons learned by the OFCCP, the proposed revisions to the EEO-1 Report also would gather aggregate compensation data by EEO-1 job category – apparently in the name of collecting some compensation information from all employers, without regard to whether the data would have any utility.

Reviewing compensation data at this level is unlikely to shed any light whatsoever on whether an employer's pay practices are discriminatory. This is because each EEO-1 job category includes a wide range of job titles, for which vastly different rates of pay are provided based on a variety of legitimate, nondiscriminatory factors. For example, the Professionals EEO-1 job category may include entry-level marketing professionals as well as medical providers with advanced degrees in specialty practices and IT professionals with sought-after skills. The pay for each of these positions, even though they are within the same broad EEO-1 job category, will vary significantly. In addition, reporting compensation data by EEO-1 establishment compounds this problem. For example, one employer may have a single establishment where all IT Professionals work. Another employer in the same industry may have its IT Professionals scattered among many different establishments, such that the compensation data of the IT Professionals would be reported with that of other employees in the Professionals EEO-1 job category. Even assuming the two employers employ the same number of male and female IT Professionals and pay them similarly and fairly, the Component 2 data for each employer will look vastly different because the relevant data for each employer is aggregated by the artificial parameters of EEO-1 job category and establishment location.

At the public hearing on its proposal, the EEOC requested comment on whether the ten broad EEO-1 categories should be further sub-divided to address this concern. SHRM strongly opposes further sub-dividing the current EEO-1 categories because of the significant burden associated with such a proposal. Employers would have to evaluate the EEO-1 job categorization of thousands of employees into any sub-divided EEO-1 categories and then recode that information in their HRIS systems – costs totally unaccounted for in the agency's current burden estimate. Moreover, for many EEO-1 categories, this exercise would be extremely complex and likely lead to different results among similar employers. For example, certain Professionals might reasonably fit into more than one sub-category, depending on the particular focus of their current job duties. Without significant guidance from the EEOC, employers in the same industry or same geographic region might easily place these individuals in different sub-categories under the current EEO-1 Professionals job category.

Generally speaking, SHRM believes that it is most appropriate to analyze compensation data by individual job title. Other groupings simply are too broad for meaningful analysis of the reasons for particular compensation disparities. However, providing such granular data to the government increases our members' concerns about the confidentiality of such data. In many

companies, there will only be one, two, or three individuals who perform the same job, making it much more likely that publishing any compensation data collected will have a negative impact on an organization's overall competitiveness. Moreover, reporting individual employee data on an annual basis is simply not a viable option for employers, because reporting even individual employee-level data cannot account for the complexity and individualized nature of employer compensation practices unless additional information regarding the factors that influence pay are also collected. These limitations of the proposed data collection, and the lack of other reasonable alternatives, only serve to underscore the need to abandon the proposed data collection effort altogether.

D. Using Data For Industry-Wide Compensation Trend Analyses and Enforcement Investigations

The EEOC's proposal states that it will use the compensation data collected to "focus investigations" and "identify employers with existing pay disparities that might warrant further investigation." Our members' experiences with evaluating their own pay systems strongly imply that the use of aggregated compensation data is not even a minimally effective tool for identifying discriminatory pay practices, particularly in light of the limitations discussed above regarding the data points the government plans to collect.

As discussed above, the OFCCP itself understands this for two reasons. First, the agency recently revised its scheduling documents to require that all contractors submit employee-level compensation data, precisely because aggregated compensation data proved ineffective at ferreting out compensation discrimination. Second, the OFCCP's experience with the EO Survey has already confirmed that analyzing aggregated compensation data by EEO-1 job category is not useful for identifying potential discrimination by federal contractors. Indeed, an independent team of experts concluded that OFCCP's efforts to collect compensation data by EEO-1 job category in the EO Survey had "no relation to the determination of systemic discrimination." This led the OFCCP itself to conclude that the compensation data required by the EO Survey was collected in such a raw and aggregate form that it had "negligible value in predicting compensation discrimination." 71 Federal Register 53037 (September 8, 2006). SHRM believes that the EEOC will ultimately reach a similar conclusion if it goes forward with the proposed Component 2 data collection requirement, but only after employers have spent millions of dollars trying to comply with the proposed data collection tool.

Furthermore, since the data submitted by an employer on its EEO-1 Reports is also shared with OFCCP for purposes of scheduling compliance reviews, it is important to note that an employer's affirmative action plan ("AAP") structure does not necessarily align with the proposed requirement to file pay data by each separate establishment, as that term is defined for EEO-1 reporting purposes. Because there is not a one-to-one relationship between EEO-1 establishments and location-based AAPs, any information the agency might obtain through a review of summary compensation data on an EEO-1 establishment basis would not enable OFCCP to target its enforcement efforts to a corresponding AAP location. For example, OFCCP's affirmative action regulations require that an employee be reported in the AAP where his or her manager works. 41 CFR § 60-2.1(d)(1). However, there is no such requirement for EEO-1 reporting, unless the employee does not regularly work at an establishment of the employer, in which case the employee should be included on the EEO-1 Report for the location to which he or she reports. Given this, there is no utility in reviewing compensation data

collected on an EEO-1 establishment basis for OFCCP scheduling purposes because there may not be a single AAP covering all of the employees listed on the establishment-based Component 2 portion of the EEO-1 Report.

SHRM also respectfully urges the EEOC to reconsider publishing any compensation data collected from employers to help stakeholders identify industry-wide compensation trend analyses, including making such information available to academic researchers who are conducting their own independent research. In order to conduct meaningful trend analyses, SHRM believes the agency would have to collect far more detailed information than is necessary or desirable for enforcement purposes, particularly on an annual reporting basis. The agency's interest in publishing this information and in advancing the independent work of academic researchers are not legitimate reasons to impose the significant burden such data collections would impose on employers.

E. Using Data For Employer Self-Assessment and As A Compliance Deterrence

The EEOC's proposal broadly suggests that another benefit of its proposal is that the mere process of reporting pay data will "encourage employers to self-monitor and comply voluntarily if they uncover pay inequities." 81 Federal Register 5113, 5115. For the same reasons that the proposed data collection will not provide the government meaningful data on which to focus investigations or identify enforcement priorities, the mere reporting of pay data, particularly W-2 gross wage information, will also not serve as a useful tool for employers to evaluate whether their pay practices are non-discriminatory, which is what is required under the law.

Underlying the likelihood of this objective being met is a fundamental misunderstanding of how some employers file EEO-1 Reports. Many employers currently gather the data necessary for current EEO-1 Report filing through a purchased module in third party HRIS. In some cases, the report generated does not provide an employer access to the underlying data – for example, who are the five women Professionals who appear to be paid less than all other Professionals? Instead, an employer would need to requery its HRIS system in an attempt to discern this information. Because data in an HRIS system is not static, and at large companies, can change in seconds, this exercise will not always yield the same results, even when completed just hours or even minutes after the query for the EEO-1 Report data.

More importantly, in order to conduct an analysis of whether their pay practices are discriminatory, employers need access to far more information than would be collected through an EEO-1 Report. Employers do not generally examine pay equity issues by looking at employees' W-2 wages, precisely for the reasons discussed above. Employers also need to know other information, such as the actual duties being performed by each employee, or each employee's prior experience, educational attainment, or specialized skill set. Moreover, the individuals who are responsible for filing an employer's EEO-1 report (characterized as "administrative support workers" in the EEOC's burden estimates) may not also be responsible for overseeing the company's compensation practices.

Most employers already have practices and policies in place to conduct meaningful self-assessments of compensation decisions and to benchmark their compensation practices against others in their industry. The methods of analysis vary from employer to employer depending on

the type of job, the nature of the compensation review, and other relevant variables. For example, an employer may benchmark the compensation of its mailroom staff against the compensation paid to other mailroom employees within a relatively short distance, regardless of industry. On the other hand, this same employer might evaluate the compensation of its chief executive officer against that of other chief executives working in the same industry on a nationwide basis.

For these reasons, and others, our members report that they are highly unlikely to use any compensation data collection tool developed by the agency to conduct any self-analyses of their own compensation practices. The data that could be assembled through the proposed data collection tool will lack the reliability of targeted market data and internal compensation information that employers already can access. Accordingly, the proposed data collection tool will not supplant the more specific strategies employers already have in place for analyzing compensation decisions and comparing their compensation system against those of comparable companies.

Our members also do not believe that the proposed data collection tool will have the "deterrent" effect the agency believes. The EEOC's proposal is based, in part, on the assumption that mere collection of compensation data will have a deterrent effect, regardless of the reliability of the data collected. SHRM respectfully disagrees with this conclusion because we do not believe the government will be able to use the information collected to effectively target non-compliant employers. Given this, the clear import of the EEOC's stated deterrence objective is that the agency believes employers are likely to change pay practices that appear to be below industry averages, regardless of whether the reason for the disparity is because of race or gender, in order to avoid an EEOC investigation or OFCCP compliance review. This is not an appropriate use of the agency's enforcement authority, however, because Title VII only requires nondiscriminatory pay practices, not "fair pay" or equal pay across dissimilar jobs on an aggregated basis.

F. The Proposed Data Collection Does Not Minimize The Burden on Filers

In evaluating this proposal, the Office of Management and Budget must review the EEOC's data collection request to minimize the paperwork burdens on impacted small businesses, federal contractors and other affected persons. The EEOC's burden estimate is woefully inadequate, both in terms of estimated cost and detailed explanations of the agency's estimate of current burden hours for filing Component 1 of the EEO-1 Report and estimated burden hours for the proposed Component 2.

1. The Number Of Hours It Takes To Comply With The Current EEO-1 Report (Component 1)

The EEOC's burden estimate for the proposed data collection reflects a deep misunderstanding of how employers actually comply with the requirement to file their current EEO-1 Reports, referred to as Component 1.

Prior to this proposal, the EEOC estimated the annual filing burden by using the amount of time it took to complete and submit each establishment report. In the current proposal, the EEOC estimates the burden of filing Component 1 using a per filer estimate, regardless of whether the filer submits one EEO-1 Report or hundreds on an annual basis. The agency justifies

its approach by noting that "employers now rely extensively on automated HRIS to generate the information they submit on the EEO-1 Report. As a result, [the agency's burden estimate] is based on the time spent on the tasks involved in filing the survey, rather than on "key strokes" or data entry. As such, it more accurately reflects how virtually all employers actually complete the EEO-1." 81 Federal Register at 5120.

This revision to the burden estimate completely ignores the fact that most employers (indeed, over 97% of employers who filed an EEO-1 report in 2015) manually enter data into each cell for each of their establishments using the EEOC's online portal. Although the EEOC refers to this as "electronic submission," these employers are in fact still using "key strokes" to enter data into each relevant cell, albeit on an electronic rather than paper form. Given this reality, arguing that the *per employer* cost is now the same as the *per report* cost from two years ago strains credibility.

An informal survey of our members reveals that the agency's estimate of current burden is indeed, far too low. On average, our members indicate that compiling and verifying the underlying data and then filing these required reports in 2015 took far longer than the 3.4 hours the EEOC estimates. Of the 262 members who responded, more than 90% filed their own EEO-1 Reports without the assistance of a vendor. About 70% of responders indicated that their company manually entered its EEO-1 Report data into the EEOC's electronic filing submission, while about 9% used the batch upload feature. Of the members who provided SHRM with data regarding the actual number of hours required to prepare their company's 2015 EEO-1 Reports, the overwhelming majority indicated that more than 3.4 hours was required. This is true even though the members who responded disproportionality worked for smaller employers, defined as those companies with under 1000 total employees.

2. The First Year Cost of Implementation

The EEOC's proposal also fails to recognize the true cost of the initial burden associated with generating W-2 wage and hours worked information by EEO-1 job category and race/ethnicity and gender. The EEOC estimates that employers who will file both components will incur one-time costs of approximately $23 million to develop queries related to the new requirements. The agency estimates that it will take one employee at each filer 8 hours to complete this one-time programming, at an average cost of just $400 per filer.

As an initial matter, contrary to the agency's assumption, not all employers who might have to file the proposed Component 2 maintain the currently required data points in an HRIS. In fact, almost 20% of the more than 250 members who responded to our informal survey indicated their company did not currently have an HRIS. These employers will have to manually match the employees reported on their EEO-1 Report with their W-2 wage data and hours worked. While the one-time implementation costs for these employers may be different, the annual recurring costs for these employers will be far greater than the $160 (6.6 hours x $24.23 per hour for each filer) the EEOC estimated.

Furthermore, even when electronic data management systems are in place, W-2 wage information is typically stored in an employer's payroll system, while EEO-1 job category and race/ethnicity/gender data is stored in an employer's HRIS. Likewise, actual hours worked information may be stored in yet a third timekeeping system. Gathering data from different

systems is far more complicated than pulling additional data points from the same system. Many large employers also utilize different HRIS, timekeeping, and/or payroll systems for different subsidiaries, acquired or merged companies, areas of the country, or type of worker, meaning that the number of systems that need to talk to each other may be far greater than just two or three for many larger employers. The fact that the proposed data collection covers different calendar years makes creating a single report that will gather the necessary data for the correct employees even more complicated.

The agency also must keep in mind that these types of changes will be incorporated into various types of electronic systems. In some cases, despite having all of the required data available in electronic format, the employer will be unable to create a single report format. In other cases, the employer will not have the budget for this type of system change or will have to wait until this change can be prioritized over other competing IT needs. In any case, the responsible team member will first have to develop detailed specifications for the required data collection, and then IT will have to review, implement and test those specifications before an electronic report can be finalized. This process will take far longer than the agency's estimate of 8 hours of work by one IT professional.

SHRM believes that it will take many more hours to develop, test and implement first-year filing processes. The burdens will be particularly high for larger employers with multiple information technology systems that need to be integrated. Our members who responded to our informal survey agreed that the EEOC's implementation cost estimate was far too low. While many SHRM members indicated they did not know how much it would cost their organization to implement the proposal if finalized, the majority of those who provided an estimate argued that the costs were far greater than the $378 estimated by the EEOC. About 15% of responders estimated their one time implementation cost at $5,000 or more per employer, more than 10 times what the EEOC suggests in its proposal.

3. The Number of Hours It May Take To Comply With Component 2 On An Annual Basis

The EEOC estimates that it will take each filer 6.6 hours to file both components of the EEO-1 Report. In reaching this estimate, the EEOC estimates that it will take one hour for each filer to read the instructions and 5.9 hours to collect, verify, validate, and report data on both Component 1 and Component 2. Like the agency's revised burden estimate for the current EEO-1 Report, this estimate is calculated per filer, rather than per form. The EEOC again assumes that a single administrative employee will complete all of this work, at an hourly rate of $24.23.

The agency provides no further detail as to how it arrived at these burden estimates, but it is clear that the agency relied on the same misguided assumption that it did when recalculating the current burden costs. As noted above, electronic filing, rather than paper filing, does not eliminate the need for filers to manually key the data into each relevant cell for each establishment, headquarters and establishment report. Does the EEOC really believe that an employer who files even just 10 EEO-1 Reports can collect, verify, validate, and report data in the 36,600 cells required for both Component 1 and Component 2 (3,660 cells per EEO-1 Report x 10 EEO-1 Reports) in 3.4 hours?

Members who responded to SHRM's informal survey certainly do not. About 80% of the SHRM members who responded estimated that it will take more than 6.6 hours to file the propose EEO-1 Report. Almost 20% of responders thought it would require more than 30 hours of time to file. SHRM members who file a larger number of reports did not report significant time savings from filing multiple reports. And small employers who may file fewer reports will need more than 6.6 hours because of the limited resources available to them.

Furthermore, if the EEOC truly believes that the "mere reporting" of compensation data is likely to encourage employers to self-monitor and comply voluntarily if they uncover pay inequities, it cannot be the case that the EEOC also believes that a single administrative employee paid $23.24 per hour will collect, verify, validate, and report the data required by the proposed data collection. Quite simply, the agency cannot simultaneously minimize the burden of the proposed data collection by saying a low-level administrative employee will handle the reporting and then, in the same breath, maximize the benefit of the proposed data collection by asserting that the proposed reporting will encourage employers to voluntarily address any pay disparities identified through the reporting process. As discussed above, and as acknowledged by nearly every presenter at the public hearing including the academic researchers, understanding the reasons for raw wage disparities, and determining whether any part of such disparities is due to race or gender, is far more complicated than the work performed by an administrative employee in 6.6 hours. Because Title VII protects both men and women, and individuals of all races, employers cannot simply adjust the wages of employees because of an identified raw wage gap without fully satisfying themselves that legitimate, nondiscriminatory reasons cannot explain the difference in pay, thereby justifying remedial action.

As noted above, the data collected would literally be of no value to the EEOC's mission or to employers' self-assessments of their pay practices. Moreover, the actual burden of the proposal is far more significant than the agency estimates and will increase measurably the costs of doing business with the government. Quite simply, the EEOC's proposal does not only provide insufficient justification for the estimated burdens associated with yet another new data collection requirement, it also severely underestimates the amount of time it takes employers to collect, verify, validate, and report the data points required by the current EEO-1 Report and any revised form.

G. The Importance of Phased-In Compliance and Staggered Reporting

As SHRM and its members have emphasized in other contexts, compliance budgets are not unlimited. Adding to the complexity is the fact that the proposal will likely require that some employers (or their vendors) make system changes in order to collect and maintain the proposed W-2 wage and hours worked information in a manner that can be easily matched with existing EEO job category, race, ethnicity, and gender data. These budgets are often set well in advance, and competing projects need to be prioritized because not all system changes can be made at the same time.

Our members believe that they will need at least 12 months between the date of any finalized data collection reporting requirement and the first required filing in order to prepare for this new reporting requirement. While the agency's proposal currently provides that Component 2 will not be required any sooner than the 2017 filing cycle, the agency must recognize that the

data that needs to be gathered for that report may cover W-2 wage and hours worked information for a period of time beginning as early as July 2016. To provide employers with a full implementation year the EEOC has to account for the fact that data collection begins one full year before any report can be filed. Because of this, SHRM respectfully requests that EEOC delay implementation of Component 2 until the 2018 filing cycle. Providing this additional time will allow employers the necessary time to update and test their systems to ensure that the appropriate data is being collected and can be gathered. Requiring filing in 2017 is unacceptable since employers are just learning of the EEOC's proposal and need time, as discussed above, to change their HRIS and other systems to appropriately maintain and report this data.

To further minimize the burden on employers, SHRM also suggests that the EEOC consider requiring that Component 2 be filed less frequently, such as every other year or every three to four years. This approach would better satisfy the PRA's mandate that any data collection minimize the burden on filers, while still providing the EEOC with some access to compensation information.

CONCLUSION

SHRM wholeheartedly supports the EEOC's efforts to root out unlawful compensation discrimination, to the extent it exists. However, SHRM urges the agency to thoughtfully consider whether the proposed revisions to the EEO-1 Report will meet the agency's stated objectives. Given the type of pay data to be collected, and the highly aggregated manner in which such data is to be reported, SHRM believes that, like earlier efforts by the government to collect aggregated pay information from employers to identify employers with existing pay disparities, collecting pay data in the manner proposed in Component 2 of the EEO-1 Report will prove to be meaningless. For the same reasons that the collected data will not prove useful to the EEOC or OFCCP, SHRM also believes that neither the publication of aggregated EEO-1 compensation information, nor the mere "process of reporting pay data" on an annual basis, will be useful to employers who want to voluntarily assess their compensation practices. Moreover, the burden on covered filers of collecting the information required by the proposed EEO-1 report revisions is far greater than what the agency has estimated. Equally concerning are the confidentiality and security implications of the proposed data collection. In light of the limited utility of the proposed data collection to the agency, employers and general public, the significant unaddressed confidentiality and security concerns, and the huge additional burden on employers, SHRM urges the EEOC to withdraw its proposal.

Should the EEOC decide to move forward, the agency should collect annualized wage rate or base salary information, rather than W-2 wage data, since these data points are more readily available and easily matched to gender, race, and ethnicity data for employees in existing HRIS. Taking this approach also would eliminate the need to collect hours worked information, thereby significantly minimizing the burden on employers by eliminating the need to complete half the proposed number of cells per establishment. To further minimize the burden, SHRM suggests that the EEOC only require employers to file Component 2 every few years rather than annually, and exempt employers from having to file Component 2 for establishments under 50 or 100 employees (other than on the consolidated report).

The EEOC also must take specific, concrete steps to ensure the security and

confidentiality of the data both during the reporting process and in response to requests for such information from the public. This effort must include more concrete steps to ensure that (1) the information may be filed securely with the EEOC by filers and (2) that other entities who may receive this data, whether it be OFCCP, a state fair employment practice agency, the Department of Justice, or academic researchers, receive the information via a secure transmission process and then take steps to appropriately safeguard the information within their own systems. Finally, before any compensation data collection is implemented on a wide-scale basis, the agency should engage in further study about (1) the filing process that will be used for any compensation data collection tool to ensure that the agency has adequate resources to securely support likely changes in filing patterns; and (2) the development of any statistical tools that would be utilized by internal staff for enforcement purposes through rigorous review of the reliability of statistical analyses of non-synthetic compensation data in identifying likely pay discriminators.

SHRM appreciates the opportunity to submit these comments. In addition, we would be pleased to meet with you to discuss possible ways to address the underlying objectives of the agency's proposal that would prove more workable for the agency, employees, and employers.

Respectfully submitted,

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